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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

MICHAEL BOWERSOX,
Superintendent of the Potosi Correctional Center,

Petitioner,

vs.

CALVERT L. ANTWINE,
A State Prisoner Under Capital Sentence,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

## PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

## Questions Presented For Review

I.

Whether a federal appellate court reviewing a state-court conviction may overturn state-court fact-findings and credibility determinations without finding an exception to the statutory presumption of correctness under 28 U.S.C. § 2254(d).

II.

Whether a prosecutor's penalty-phase closing argument that the defendant would be put to death "instantaneously," which did not affirmatively mislead the jury as to its role in the capital sentencing process, violated the Eighth Amendment.

III.

Whether a prosecutor's penalty-phase closing argument that the defendant would be put to death "instantaneously" and an argument that the cost to taxpayers of an execution was less than the cost of life imprisonment violated the Fourteenth Amendment.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## Opinions Below

The panel opinion of the United States Court of Appeals for the Eighth Circuit granting the writ of habeas corpus is reported at 54 F.3d 1357 (8th Cir. 1995), and is published in the Appendix at A-1. The order of the district court denying the petition for writ of habeas corpus is not reported, but is included in the Appendix (A-32).

## Jurisdictional Statement

The United States Court of Appeals for the Eighth Circuit issued its opinion on May 12, 1995 (A-1). The petition for rehearing or rehearing *en banc* was denied by the court of appeals on July 25, 1995 (A-19). Pursuant to 28 U.S.C. § 2201(c) and Supreme Court Rules 13.01 and 13.4, the present petition for writ of certiorari was required to be filed by petitioner within ninety days. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## Constitutional and Statutory Provisions

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty or property without due process of law . . . .

## Statement of the Case

Ten years ago, respondent, Calvert L. Antwine, was found guilty by a jury of first-degree robbery, second-degree murder, and capital murder in the Circuit Court of Jackson County, Missouri. The jury recommended that he be sentenced to a thirty-year term of imprisonment for robbery, life imprisonment for second-degree murder, and death for capital murder. Respondent was sentenced accordingly.

The circumstances of respondent's offenses were summarized by the Missouri Supreme Court on direct appeal.

> At approximately 6:00 p.m. on November 11, 1983, appellant arrived at 2108 Vine Street where several men were refurbishing a restaurant for the owner, Eric George Jones ("George"). Appellant, who was known by the workers, asked where George Jones or his brother, Winston, could be found. When the workers, who were involved in a crap game, appeared to ignore appellant, appellant decided to "bust up" the crap game. He produced a handgun and announced, "This is a stick up." After firing several shots into the wall and hitting a space heater, appellant took money from the workers and left the restaurant.
>
> From the restaurant, appellant immediately proceeded to the Lincoln Garden Apartments, located a block away from the restaurant. There he encountered Joy Jones, the sister of George and Winston Jones, who was leaving the apartment she shared with Winston. Joy was several yards from the

doorway to her apartment when she saw appellant approaching. When she asked him what he wanted, appellant indicated that he was looking for George and Winston. When Joy asked what he wanted with her brothers, appellant said he was going to kill them. Appellant proceeded to the doorway where he demanded that Winston open the door. Winston cracked open the door, whereupon appellant forced his way in. As the apartment door closed, Joy ran to the restaurant to look for George.

Shirley Ford and her daughter, LaTanya, lived in an adjacent apartment. They observed appellant forcing his way into Joy's apartment, saw that he was carrying a gun, and heard appellant yell, "I'm going to kill all of you mother _____." After appellant entered the apartment, Shirley and LaTanya heard shots. Shirley called the police. She observed appellant leaving the apartment carrying a gun and a black bag. Appellant entered a gold and black car and drove away.

Police officers later found Winston Jones lying face down on the living room floor of the apartment with three gunshot wounds to his head. At trial, the medical examiner testified that two of the wounds were caused by a weapon fired while flush against the skin. Other items found in the apartment included a large quantity of marijuana and twelve hundred dollars in cash.

After leaving Joy's apartment, appellant proceeded to a house at 26th and College from which the Jones brothers operated a drug business. While appellant was there, George Jones arrived with Joy and two others. George knocked on the door where he was met by appellant with a gun in his hand. George turned and fled. Appellant gave chase and caught him. Joy heard appellant say, "I just killed your brother and I'm going to kill you too." Appellant directed George at gun point back to the car and forced George to drive.

Sometime between 6:00 and 7:00 p.m., two police officers were separately dispatched to the intersection of 34th and Prospect on a disturbance call. Upon arrival, the officers observed appellant and George struggling in the middle of the street over the possession of a handgun. The officers approached, secured the gun and broke the two men apart. Both appellant and George were placed under arrest, handcuffed behind the back and put into a paddy wagon for transport to the police station. While in the paddy wagon, appellant stepped through his arms so that his hands were in front of his body.

Upon arrival at the station, Officer Schilling, the paddy wagon driver, placed George and appellant in a holding cell. Approximately five to ten minutes later, Officer Schilling heard a scream coming from the holding cell and ran back to investigate. He and another officer, Detective Lonkansky,

> entered the cell and found George lying face down on the floor, semiconscious and bleeding from the nose and mouth. Appellant was seated on a bench three to four feet away.
>
> Officer Schilling left the cell to call an ambulance. Realizing that he was wearing his service revolver, Detective Lonkansky call for assistance and stepped out of the cell. He had walked approximately four feet when he heard a loud thumping sound. Turning, he saw appellant in midair, coming down with both feet on the side of George's head. Detective Lonkansky again shouted for assistance. Appellant sat back down on the cell bench, picked up a rag off the floor and calmly proceeded to wipe blood off his shoes. The medical examiner testified that George Jones died as the result of a blunt force injury to the head, and that such injury was consistent with being kicked, stomped or beaten against a concrete floor.
>
> Appellant contended that he killed the Jones brothers in self-defense. More specifically, appellant urged the jury to believe that he wanted out of the drug business, in which he was engaged with the Joneses, and that the Joneses threatened to kill him if carried out his intention to quit.

State v. Antwine, 743 S.W.2d 51, 55-56 (Mo. banc 1987), cert. denied, 486 U.S. 1017 (1988) (footnote omitted) (A-52 to A-55). The Missouri Supreme Court affirmed respondent's convictions and sentences (A-52). Id.

Following his direct appeal, respondent, sought post-conviction relief in the Circuit Court of Jackson County pursuant to Missouri Supreme Court Rule 29.15. Following an evidentiary hearing, the circuit court denied relief. Respondent appealed. On appeal, the Missouri Supreme Court affirmed the circuit court's denial of post-conviction relief (A-96). Antwine v. State, 791 S.W.2d 403 (Mo. banc 1990), cert. denied, 498 U.S. 1055 (1991).

Respondent filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 on January 28, 1991, in the United States District Court for the Western District of Missouri. After litigation before the district court, District Judge Dean Whipple denied the petition for writ of habeas corpus (A-32).

Respondent appealed the denial of the writ to the United States Court of Appeals for the Eight Circuit. After briefing and oral argument, the Court issued its opinion vacating respondent's death sentence and remanded the cause to the District Court with directions that the writ of habeas corpus issue (A-1). Petitioner filed a petition for rehearing and rehearing *en banc*. On July 25, 1995, the panel denied the petition for rehearing (A-119). The suggestions for rehearing *en banc* were also denied; however, one judge of the appellate court, the Honorable C. Arlen Beam, voted to grant the petition for rehearing *en banc* (A-119).

## Argument

### I. WHETHER A FEDERAL APPELLATE COURT REVIEWING A STATE-COURT CONVICTION MAY OVERTURN STATE-COURT FACT-FINDINGS AND CREDIBILITY DETERMINATIONS WITHOUT FINDING AN EXCEPTION TO THE STATUTORY PRESUMPTION OF CORRECTNESS UNDER 28 U.S.C. § 2254(d).

In 1966 Congress enacted subsection (d) of 28 U.S.C. § 2254 to mandate that federal habeas courts apply a presumption of correctness to state-court findings of fact. This statute requires that federal courts show a high measure of deference state-court fact-findings. Sumner v. Mata (Sumner II), 455 U.S. 591, 597-98 (1982). The purpose of this provision was to alleviate friction between state and federal courts that is inherent in habeas review. Sumner v. Mata, (Sumner I) 449 U.S. 539, 550 (1981). Under the statute, state-court factual findings "shall be presumed to be correct" unless one of eight statutory exceptions exist. 28 U.S.C. § 2254(d); Sumner I, 449 U.S. at 550.

In this case, the Eighth Circuit Court of Appeals expressly declined to apply the statutory presumption of correctness to the state court's factual findings and reviewed the factual issues *de novo*. More significantly, the court of appeals reviewed the trial court's credibility determination *de novo* with no deference to the trial court's superior ability to assess the demeanor of the witness. This case presents a significant issue in that the court of appeals' opinion gives federal courts in this circuit license to disregard the congressional mandate that a presumption of correctness be applied to state-court factual determinations.

Respondent alleged during his state-court post-conviction litigation that he received ineffective assistance of . .

trial counsel because his attorney failed to present a mental disease defense and failed to present mental health mitigating evidence during the penalty-phase of his trial. An evidentiary hearing was held before the motion court. Respondent presented the testimony of Dr. William O'Connor (A- 168 to A-271). Following the evidentiary hearing, the motion court entered detailed findings of fact and conclusions of law (A-116 to A-118).

In summary, the motion court found Dr. O'Connor not to be a credible witness and the court rejected Dr. O'Connor's conclusion that respondent was suffering from a bi-polar disorder at the time of the offense (A-116 to A-118).[1] The motion court discredited Dr. O'Connor's testimony, in part, because his evaluation of respondent occurred five years after the offense, because he failed to interview respondent's friends and family to establish whether respondent had a history of bi-polar behavior, because he could not say with any certainty that respondent was suffering from a bi-polar disorder at the time of the offense, because there was no evidence that the pre-trial examination which concluded that respondent was not suffering from a mental disease was substandard, because respondent's offense behavior was inconsistent with a bi-polar disorder, and because Dr. O'Connor failed to conduct a blood test that would have objectively determined whether respondent suffered from a bi-polar disorder (A-116 to A-118). The motion court credited the pre-trial report of Dr.

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[1] Dr. O'Connor is a professional defense witness who is familiar to the Missouri Courts. This case is one of many in which a finder of fact has rejected Dr. O'Connor's conclusion that the defendant suffered from a mental disease or defect. E.g., State v. Harris, 870 S.W.2d 798, 819 (Mo. banc), cert. denied, __ U.S. __, 115 S.Ct. 371, 130 L.Ed.2d 323 (1994); Sidebottom v. State, 781 S.W.2d 791, 795, 797 (Mo. banc 1989), cert. denied, 497 U.S. 1046 (1990); State v. Mease, 842 S.W.2d 98, 114 (Mo. banc 1992), cert. denied, __ U.S. __, 113 S.Ct. 2363, 124 L.Ed.2d 269 (1993); Guinan v. Delo, 5 F.3d 313, 318 (8th Cir. 1993).

Robijn Hornstra which concluded that respondent was not suffering from a mental disease or defect and that his behavior was consistent with PCP intoxication (A-117 to A-118). The motion court ruled that respondent received effective assistance of counsel (A-118). The Missouri Supreme Court held that the motion court's factual findings were not "clearly erroneous" (A-111). Antwine v. State, 791 S.W.2d 403, 411-12 (Mo. banc 1990), cert. denied, 111 S.Ct. 769 (1991).

A claim of ineffective assistance of counsel presents a mixed question of law and fact. Strickland v. Washington, 466 U.S. 668, 698 (1984). While the ultimate conclusion as to whether counsel was effective is a question of law subject to *de novo* review, state court findings of fact made while resolving an ineffectiveness claim are entitled to the statutory presumption of correctness. Id. The standard to be applied by reviewing courts to state-court fact findings was succinctly articulated by this Court in Sumner I:

> [T]he findings made by the state-court system "shall be presumed to be correct" unless one of seven conditions specifically set forth in § 2254(d) was found to exist by the federal habeas court. If none of those seven conditions were found to exist, or unless the *habeas* court concludes that the relevant state-court determination is not "fairly supported by the record," "the burden shall rest upon the applicant to establish *by convincing evidence* that the factual determination by the State court was erroneous." (Emphasis supplied).

Sumner I, 449 U.S. at 550. In adopting this standard, the Court recognized that it was Congress' intent that a state-court fact-finding not be overturned merely by a . .

"preponderance of the evidence." Id. at 551. To ensure that Congress' intent was carried out, this Court mandated that when a federal court overturns a state-court fact-finding, the court should include in its opinion an explanation of which statutory exception it applied and why. Id. at 551-52.

The most commonly recognized exception to the presumption of correctness is a finding that the state-court factual determination is not fairly supported by the record. 28 U.S.C. § 2254(d)(8). In considering whether a state-court finding is "fairly supported by the record," it is not enough for the reviewing court to disagree with the trial court's findings; rather, the court must conclude that the state court's finding "lacked even 'fair support' in the record." Marshall v. Lonberger, 459 U.S. 422, 432 (1983); Wainwright v. Witt, 469 U.S. 412, 434 (1985). Moreover, this standard of review is no broader than that applicable to review of lower federal courts' determinations. Marshall v. Lonberger, 459 U.S. at 434-35; F.R.C.P. 52(a) (findings of fact made by a lower federal court shall not be set aside unless "clearly erroneous"). Finally, if there is an ambiguity in the record, the trial court is entitled to resolve that ambiguity in favor of the state. Wainwright v. Witt, 469 U.S. at 435.

In reviewing respondent's claim of ineffective assistance of counsel, the court of appeals adopted the following standard of review, which is inconsistent with 28 U.S.C. § 2254(d), to be applied to state-court findings of fact:

> The Rule 29.15 motion court, however, found "no credible evidence to support the defendant's claim that he suffered from a mental disease or defect," Antwine v. Delo, No. CV88-14232, slip op. at 10-11 (Mo. Cir. Ct., Sept. 5, 1989) [A-116 to A-118], and the State argues that this state-court finding is

> entitled to a presumption of correctness under 28 U.S.C. § 2254. We disagree. The issue is whether the failure to discover and present evidence of Antwine's mental condition undermines our confidence in the outcome of either the guilt or sentencing phase of the trial. We are concerned, then, with whether the jury--not the motion court--would have found the evidence of Antwine's mental condition credible.

Antwine v. Delo, 54 F.3d 1357, 1365 (8th Cir. 1995) (A-16). The court of appeals conducted a *de novo* review of the motion court's underlying factual findings outlined above (A-16 to A-19). Id. at 1366. The court of appeals presumed that Dr. O'Connor's testimony was true despite the motion court's contrary conclusion (A-16 to A-19). Id. Apparently, the court of appeals believed that the motion court was obligated to credit both the factual statements and the ultimate conclusions of Dr. O'Connor simply because the State did not present contrary evidence. The court of appeals, however, may not substitute its own judgment as to the credibility of Dr. O'Connor for that of the state court. This is a prerogative that 28 U.S.C. § 2254 does not allow. Maggio v. Fulford, 462 U.S. 111, 113 (1983).

> Title 28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them. In United States v. Oregon Medical Society, 343 U.S. 326, 72 S.Ct. 690, 96 L.Ed. 978 (1952), commenting on the deference which this Court gave to the findings of a District Court on direct appeal from a judgment in a bench trial, we stated:

> "As was aptly stated by the New Your Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal." Boyd v. Boyd, 252 N.Y. 422, 429, 169 N.E. 632, 634." *Id.*, at 339, 72 S.Ct. at 698.

Marshall v. Lonberger, 459 U.S. at 434. In this case "the three judges of the Court of Appeals appear to have differed from the [Missouri] trial judge, the seven justices of the Supreme Court of [Missouri], and the federal district judge, only with respect to evaluation of the evidence before the trial court." Maggio v. Fulford, 462 U.S. at 116. This, however, is an improper basis upon which to grant a writ of habeas corpus. Id.

The motion court's factual findings are fairly supported by the record and are dispositive of respondent's claim of ineffective assistance of counsel. The court of appeals may disagree with the motion court's fact findings "[b]ut the statute [requires] the federal courts to face up to any disagreement as to the facts and defer to the state court unless one of the factor's listed in § 2254(d) is found." Sumner II, 455 U.S. at 597-98. The court of appeals failed to follow this mandate.

II. WHETHER A PROSECUTOR'S PENALTY-PHASE CLOSING ARGUMENT THAT DEFENDANT WOULD BE PUT TO DEATH "INSTANTANEOUSLY," WHICH DID NOT AFFIRMATIVELY MISLEAD THE JURY AS TO ITS ROLE IN THE CAPITAL SENTENCING PROCESS, VIOLATED THE EIGHTH AMENDMENT.

This point presents a significant issue which provides the Court with an opportunity to clarify the extent to which its Eighth Amendment jurisprudence applies to penalty-phase claims of prosecutorial misconduct. By resolving the question of whether a penalty-phase closing argument that respondent would be put to death "instantaneously" undermined the jury's sense of responsibility for the sentencing decision, the Court will be able to further define the distinction between those arguments which call for additional scrutiny under the Eighth Amendment and those that are properly reviewed under the narrow due process standard of Donnelly v. DeChristoforo, 416 U.S. 637 (1974). See Sawyer v. Smith, 497 U.S. 227, 244 (1990) (Caldwell must be read as providing additional protection against error, beyond that afforded by Donnelly, in the capital sentencing context.).

In Caldwell v. Mississippi, the Court considered whether a capital sentence was invalidated when the jury was led to believe that the responsibility for determining the appropriateness of the death sentence rested with the appellate court. 472 U.S. 320, 323 (1985). Caldwell's jury was told by the prosecutor that its sentencing decision was not final and that it would be reviewed by the Mississippi Supreme Court. Id. at 325-327. The Court found that this argument was inconsistent with the Eighth Amendment's heightened "'need for reliability in the determination that death is the appropriate punishment in a specific case.'" Id. at 340 (quoting Woodson v. North Carolina, 428 U.S. 280,

305 (1976)). Thus, the Court held that it was unconstitutional to rest a death sentence on a determination made by a jury which was led to believe that the responsibility for determining the appropriateness of the defendant's death rested elsewhere. Id. at 328-29 (plurality opinion); id. at 343 (O'Connor, J. concurring).

Since Caldwell, the Court has discussed the distinction between claims warranting review under the Eighth Amendment and those calling for review under the Due Process Clause. The Court has consistently limited the application of Caldwell and the Eighth Amendment to instances in which the jury was mislead as to its role in the sentencing process.

In Darden v. Wainwright, 477 U.S. 168 (1986), the Court addressed the question of whether several improper comments made during the prosecutor's closing argument undermined the Eighth Amendment requirement of reliability in sentencing. In concluding that the comments did not offend the Eighth Amendment, the Court observed that Caldwell is relevant only to comments that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. Id. at 183 n. 15. In Dugger v. Adams, the Court observed that "a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law" before he can establish a Caldwell violation. 489 U.S. 401, 407 (1989).

Most recently, the Court considered whether evidence that a capital defendant already had been sentenced to death in another case impermissibly undermined the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death. Romano v. Oklahoma, ___ U.S. ___, 114 S.Ct. 2004, 129 L.Ed.2d 1

(1994). In holding that it did not, the Court again emphasized that because the prosecutor did not misstate the jury's role in the sentencing process, the infirmity identified in Caldwell was absent from the case. Id. 114 S.Ct. at 2010.

> Here, the jury was not affirmatively misled regarding its role in the sentencing process. The evidence at issue was neither false at the time it was admitted, nor did it even pertain to the jury's role in the sentencing process.

Id. Thus, Caldwell and its progeny stand for the proposition that the Eighth Amendment is violated during the penalty-phase of a capital trial only when the prosecutor's closing argument undermines the jury's sense of responsibility for deciding the appropriateness of a sentence of death by presenting inaccurate information regarding the jury's role in the sentencing process.

In the instant case, the court of appeals, held that a portion of the prosecutor's following penalty-phase closing argument violated the Eighth Amendment (A-5 to A-8). Antwine v. Delo, 54 F.3d 1357, 1361-62 (8th Cir. 1985).

> I want to make sure you understand exactly what the people of the State of Missouri are asking you to do. Let there be no question, we are asking you to put this defendant to death. We are asking you to do so by returning a verdict of capital punishment. When that occurs, he will be taken into a room. There will be witnesses that will come down. There will be a priest present. He will be asked if he has any last requests or has any last requests. He will be put in a chair. A pellet will be dropped into

> acid, and when he inhales that, he would be put to death instantaneously.
>
> This is what the people you have elected to represent you have decided is the law in the State of Missouri, and it is the proper and just punishment if, after the evidence and the facts your viewing of the aggravating circumstances which will be given to you in the instructions, you decide and be the judge of his punishment in this case.
>
> Certainly it is a far more humane execution than this man provided Eric [George] Jones. If you're up and deliberating on this matter, and no one is going to take it lightly, and it shouldn't be taken lightly, and I would suggest that all you search your own soles before discussing it . . . (A-148 to A-149).

Specifically, the Court of Appeals found that the prosecutor's description of execution by lethal gas as "instantaneous" offended Eighth Amendment concerns regarding the arbitrary imposition of the death penalty because it was inaccurate and because it undermined the jury's sense of responsibility for imposing a sentence of death by easing the jury's conscience with the knowledge of a quick and easy death (Id.).[2] Id. The Court of Appeals did not conclude that the comments misdescribed the jury's role in the sentencing process. Rather, the Court of Appeals concluded that death by lethal gas does not occur instantaneously, and therefore, the

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[2] The court did not consider whether its application of Caldwell violated Teague v. Lane, 489 U.S. 288 (1989).

prosecutor's comments were inaccurate (Id.).[3] Id. The prosecutor's argument, however, may only be characterized as inaccurate when taken out of context.

In an absolute or abstract sense death by lethal gas may not occur "instantaneously." Here, however, the prosecutor used the term in a relative sense--a sense relative to the victim's death. Compared to George Jones' death, death by lethal gas could be reasonably characterized as instantaneous.

George Jones was beaten to death in a holding cell (A-54). State v. Antwine, 743 S.W.2d 51, 55-56 (Mo. banc 1987), cert. denied, 486 U.S. 1017 (1988). Jones was placed in the cell with his hands cuffed behind his back (A-89). Id. at 72. He had neither the means to defend himself nor the means to escape the attack. Respondent repeatedly slammed Jones' head against the cell wall, the cell bars, and the cell floor, beating him into a semi-conscious state (A-89). Id. Responded then stomped on Jones' head repeatedly as Jones' lay on the concrete floor (A-54, A-89). Id. at 55-56, 72. Although he suffered massive head injuries, Jones survived in the hospital for six days before dying. The prosecutor's description of death by lethal gas as "instantaneous" is accurate when compared to the lingering death George Jones suffered.

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[3] The Court of Appeals based this conclusion upon three newspaper accounts of California's 1993 execution of Robert Alton Harris. The newspapers accounts gave varying reports that Harris lost consciousness between one and one-half and seven minutes after he breathed the lethal gas (A-6). Antwine v. Delo, 54 F.3d at 1361-62. The Court of Appeals concluded, based on these conflicting newspaper accounts, that the prosecutor's description of an "instantaneous" death was inaccurate (Id.). Id. Of course, the Harris execution, which occurred in another state eight years after the prosecutor's comments, standing alone sheds very little light on 1983 execution practices in Missouri.

Not only did the court of appeals find that the prosecutor's statement was inaccurate, but the court found that the statement diminished the jury's sense of responsibility for its sentencing decision (A-7). Antwine v. Delo, 54 F.3d at 1362. The Court of Appeals reasoned as follows:

> So where is the harm in this vision of a quick and easy death? The danger is that the jurors, faced with a very difficult and uncomfortable choice, will minimize the burden of sentencing someone to death by comforting themselves with the thought that the death would at least be instantaneous, and therefore painless and easy. The prosecutor's argument diminished the jurors' sense of responsibility for imposing the death penalty.

Id. (A-7). This reasoning suffers from the same infirmity as the reasoning rejected by this Court in Romano v. Oklahoma, supra.

In Romano, the petitioner argued that the jury sense of responsibility for its sentencing decision was undermined by the knowledge that the petitioner had a prior sentence of death. Romano v. Oklahoma, 114 S.Ct. at 2008-09. The petitioner reasoned that the jury felt that their decision was less important because his death had already been decided by another jury. The Court rejected this argument after noting that it was impossible to know how the evidence affected the jury. Id. at 2012. It seemed equally plausible to the Court that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so, depending upon one's intuition. Id. at 2012-13.

Likewise, it cannot be known what effect the knowledge that petitioner's death would be "instantaneous" had on the jury in this case. Speculation about the effect this comment had on the jury is an insufficient basis upon which to find that the jury's "sense of responsibility" was undermined. Id.

Even if the Court were to assume that the prosecutor's statement was inaccurate and/or that the comment made it easier for the jury to impose the death penalty, the prosecutor's comments did not violate the Eighth Amendment because they did not diminished the jury's view of its role in the sentencing process.

To undermine the jury's sense of responsibility within the meaning of the Eighth Amendment, the jury must be misled as to their role in the sentencing process. None of the comments in this case had the effect of misleading the jury to think that it had a reduced role in the sentencing process or that it was not the decision-making body responsible for deciding whether respondent should be sentenced to death. To the contrary, the prosecutor made it clear to the jury that it was responsible for determining whether respondent should be sentenced to die when he said: "Let there be no question, we are asking you to put this defendant to death" (A-148). Likewise, the jury instructions made it clear that it was the jury's duty to determine the appropriate sentence (A-160 to A-167). The jury fully understood that the responsibility for determining the appropriate sentence in this case rested with it. The jury was not misled regarding its role in the sentencing process.

The Court of Appeals opinion in this case ignores the limited scope of review available under the Eighth Amendment for penalty-phase claims of prosecutorial misconduct. Eighth Amendment review is limited to claims

in which the prosecutor presents (1) erroneous information which (2) misdescribes the jury's role in the sentencing process (3) such that the jury's sense of responsibility for the sentencing decision is diminished. The Court of Appeals holding which applies Caldwell to prosecutorial arguments that do not misdescribe the jury's role in sentencing is in conflict with decisions of this Court and the Courts of other circuits. Caldwell v. Mississippi, supra; Darden v. Wainwright, supra; Dugger v. Adams, supra; Romano v. Oklahoma, supra; see also Tucker v. Kemp, 802 F.2d 1293, 1296 (11th Cir. 1986) (en banc); Parks v. Brown, 860 F.2d 1545, 1549-50 (10th Cir. 1988) (en banc), reversed on other grounds sub nom., Saffle v. Parks, 494 U.S. 484 (1990); Zettlemoyer v. Fulcomer, 923 F.2d 284, 306 (3rd Cir.), cert. denied, __ U.S. __, 112 S.Ct. 280, 116 L.Ed.2d 232 (1991); Gaskins v. McKeller, 916 F.2d 941, 953 (4th Cir. 1990), cert. denied, 500 U.S. 961 (1991); Byren v. Butler, 845 F.2d 501, 509 (5th Cir.), cert. denied, 487 U.S. 1242 (1988).

III. WHETHER A PROSECUTOR'S PENALTY-PHASE CLOSING ARGUMENT THAT THE DEFENDANT WOULD BE PUT TO DEATH "INSTANTANEOUSLY" AND AN ARGUMENT THAT THE COST TO TAXPAYERS OF AN EXECUTION WAS LESS THAN THE COST OF LIFE IMPRISONMENT VIOLATED THE FOURTEENTH AMENDMENT.

This issue raises the question of what standard of review is to be applied to claims of prosecutorial misconduct during penalty-phase closing arguments. In Donnelly v. DeChristoforo, 416 U.S. 637 (1974), the Court adopted a narrow due process standard for reviewing challenges to closing arguments in non-capital cases. The Court has subsequently applied Donnelly to a claim challenging the guilt-phase closing argument in a capital case, Darden v. Wainwright, 477 U.S. 168 (1986), to a claim challenging the admission of evidence during the penalty phase of a capital trial, Romano v. Oklahoma, 114 S.Ct. 2004 (1994), and the Court has suggested that Donnelly could be used to challenge improper comments made by a trial judge during the penalty phase of a capital trial, Dugger v. Adams, 489 U.S. 401, 410 (1989). The Court, however, has not squarely addressed a due process challenge to a penalty-phase closing argument of in capital trial. While the Court's precedent indicates that Donnelly applies to these claims, the Court has yet to defined the scope of review in this context.

This case presents an excellent opportunity for this Court to review a due process challenge to a penalty-phase closing argument--a claim that has arisen in almost every circuit court and, more importantly, in almost every state court--and to determine the federal constitutional parameters for penalty-phase closing arguments. The need for definitive guidance in this area was best articulated by Judge Edward

D. Robertson, Jr., of the Missouri Supreme Court when he observed:

> . . . that, [although] we [the judges of the Missouri Supreme Court] are not bound by the decisions of the Eighth Circuit, the judgments that we review ultimately find their way to that forum for an independent federal scrutiny. That federal scrutiny sometimes appears to harbor antipathy for the judgments of state courts in death cases. Worse, even decisions that I believe are profoundly incorrect--like Antwine--cast a corrupting shadow over our decisions if we choose to attempt to predict the outcome of federal review.
>
> Yet that is what the principle opinion seems to do--to predict that federal habeas review of the death sentence in this case will result in a new penalty phase hearing. That prediction is exceedingly difficult and ultimately futile. The Eighth Circuit's recent Antwine standard is at loggerheads with Blair v. Armontrout, 916 F.2d 1310 (8th Cir. 1990), cert. denied, 502 U.S. 825 (1991). Until that court adopts an en banc standard or the United States Supreme Court speaks, the composition of the judicial panel, not predictable standards, will determine the outcome.

State v. Storey, 901 S.W.2d 886, 906 (Mo. banc 1995) (Robertson, J., concurring).

In Donnelly, this Court observed that the standard of federal habeas corpus review for closing argument claims is

"'the narrow one of due process, and not the broad exercise of supervisor power that [the court] would posses in regard to [its] own trial court.'" Donnelly v. DeChristoforo, 416 U.S. at 642 (quoting the court of appeals opinion, 473 F.2d 1326, 1238 (1973)), accord, Darden v. Wainwright, 474 U.S. 168, 181 (1986). This is so because, not every error which might call for application of supervisory powers constitutes a "'failure to observe that fundamental fairness essential to the very concept of justice.'" Donnelly v. DeChristoforo, 416 U.S. at 642 (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)). Indeed, in the context of closing arguments, it is not enough that the prosecutor's remarks were undesirable or universally condemned. Darden v. Wainwright, 477 U.S. at 181. Rather, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Id., quoting Donnelly v. DeChristoforo, supra.

Although this Court has not accepted the opportunity to apply Donnelly to a penalty-phase closing argument claim, the Eleventh Circuit Court of Appeals considered this question in a series of four *en banc* decisions. Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985)(*en banc)*, vacated and remanded on other grounds, 478 U.S. 1016 (1986), aff'd, 809 F.2d 700 (11th Cir. 1987)(*en banc*); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985)(*en banc*), cert. denied, 478 U.S. 1020 (1986); W.B. Tucker v. Kemp, 762 F.2d 1480 (11th Cir.) (*en banc*), vacated and remanded on other grounds, 474 U.S. 1001 (1985), aff'd, 802 F.2d 1293 (11th Cir. 1986), cert. denied, 480 U.S. 911 (1987); R. Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985) (*en banc*), cert. denied, 478 U.S. 1022 (1986). Building upon this Court's holding in Donnelly, the court of appeals developed several guidelines for reviewing penalty-phase closing-argument claims.

The Eleventh Circuit found that an examination of the prosecutor's argument in the context of the entire proceeding was of primary importance. Brooks v. Kemp, 762 F.2d at 1400. In addition, the court adopted the Strickland v. Washington, 466 U.S. 668 (1984), standard of prejudice for judging whether the prosecutor's comments rendered the proceeding fundamentally unfair. Id. at 1400-02. This standard requires the court to determine whether there is a reasonable probability that, but for the arguments, the death verdict would not have been given. Id. at 1413. The court also noted that as a prerequisite to finding a due process violation the argument in question must be improper. Id. at 1408. With these guidelines in mind, the court developed a two step approach to resolving penalty-phase closing-argument claims. Id. at 1403. The court first considers whether the argument was improper and then, if necessary, the prejudicial effect of the argument.

In the instant case, the court of appeals held that the prosecutor's comment that respondent would be put to death "instantaneously" coupled with the "cost to taxpayers" argument violated respondent's due process rights. The court found both arguments to be inherently improper and improper because there was no evidence in the record to support the assertions. The court further concluded that respondent was prejudiced because

> there [was] a reasonable probability that, but for the prosecutor's misleading and uncorrected description of an "instantaneous" death and his improper and unsupported references to the economic cost of life imprisonment, the outcome of this sentencing proceeding might have been different. There is no doubt that Antwine killed Eric "George" Jones in the police holding cell, but the two

> aggravating circumstances presented to the jury were balanced by some nonstatutory mitigating circumstances that could have led the jury to choose life imprisonment if the prosecutor had not fed their fears of economic burden while easing their conscience with the idea of a quick, humane death (A-13 to A-14).

Antwine v. Delo, 54 F.3d at 1364.[4] The court of appeal opinion in this case ignores several of the key principles outlined in Brooks, thereby creating a conflict with the Eleventh Circuit's decisions in this area.

First, the court of appeals took the "instantaneous" death comment out of context in ruling that the argument was improper. The prosecutor description of an execution by lethal gas as "instantaneous" was used to compare death by lethal gas with Eric Jones' violent death and to establish respondent's belief in the death penalty. The prosecutor stated:

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[4] The court found that defense counsel's response to these arguments was inadequate and did not minimize the resulting prejudice. Petitioner finds this contention incredible with respect to the "instantaneous" death argument. Defense counsel responded by graphically describing respondent struggling to hold his breath for as long as he could before inhaling the lethal gas that would enter his system and cause his death (A-157 to A-158). Defense counsel explained that it would not be a "simple procedure where he'll breathe and it's over with. It won't be that quick" (A-157). This description provoked an outburst from one of the victim's relatives (A-158). The court of appeals disregards the fact that counsel's comments--comments that supposedly enhanced and supported the prosecutor's version of execution by lethal gas--were so disturbing that they caused an outburst from the victim's family. Clearly the victim's family did not find these comments sympathetic to the prosecution. Rather, the victim's family found them offensive and disturbing. Counsel effectively responded to the prosecutor's characterization of the execution by graphically describing the condemned's struggle for life, thereby minimizing any prejudice to respondent.

> Certainly it is a far more humane execution than this man provided Eric Jones. . . . Certainly, you can be sure of one thing. This man believes in capital punishment. This man believes in the death penalty. This man believes in execution without a trial by a judge and jury. . . . (A-149).

Although the court concluded that the prosecutor's argument was improper, the Eleventh Circuit Court of Appeals held a similar argument to be proper in Brooks.

> Correctly anticipating a defense argument that the death penalty is bad, Whisnant argued that Brooks himself believed in the death penalty. The thrust of the argument was that Brooks' execution of Galloway in a manner much more horrible than a procedurally proper, legal execution demonstrated Brooks' belief in the death penalty. Following the command of Donnelly v. DeChristoforo, 416 U.S. at 647, 94 S.Ct. at 1873, that "a court should not lightly infer that a prosecutor intended an ambiguous remark to have its most damaging meaning," we doubt that the jury understood the remark in the improper way suggested by Brooks.

Brooks v. Kemp, 762 F.2d at 1411. The thrust of the prosecutor's argument in this case likewise, was that respondent believed in the death penalty. The court of appeals' conclusion that the prosecutor's argument in this case was improper is in conflict with Brooks.

In addition to finding that the prosecutor's "instantaneous" death argument was improper, the court

found the "cost to taxpayers" argument to be improper. Petitioner concedes that this argument deserves the condemnation it received by the court of appeals. Indeed, every court considering this argument has concluded that it is improper. E.g., Brooks v. Kemp, 762 F.2d at 1415; Blair v. Armontrout, 916 F.2d 1310, 1323 (8th Cir. 1990), cert. denied, 502 U.S. 825 (1991). The court of appeals, however, failed to cite any case in which this argument standing alone, or in concert with another improper argument, has resulted in the reversal of a sentence, and petitioner can find none. Cf. Darden v. Wainwright, 477 U.S. at 480-81 and n. 13. To the contrary, the Eleventh Circuit has consistently held that this improper comment did not rise to the level of a due process violation. E.g., Brooks v. Kemp, 762 F.2d at 1415 (considering the cumulative effect of this argument and three other improper arguments); W.B. Tucker v. Kemp, 762 F.2d at 1488 (considering the cumulative effect of this argument and three other improper arguments); Gates v. Zant, 863 F.2d 1492, 1503 (11th Cir. 1989), cert. denied, 493 U.S. 945 (1989) (considering the cumulative effect of this argument and six other arguments). Thus, the court of appeals opinion in this case is in conflict with these Eleventh Circuit cases. This conflict may be explained in part by the court of appeals use of a relaxed standard of review in this case. See State v. Storey, 901 S.W.2d at 906 (Robertson, J. concurring).

In granting relief, the court of appeals did not conclude that the result of the sentencing proceeding would have been different but for the complained of arguments. Instead, the court only concluded that there was a reasonable probability that the outcome of the sentencing proceeding "might" have been different. A reasonable probability that something might happen is very different from a reasonable probability that something will happen and constitutes nothing more than speculation on the part of the court of

appeals.[5] The court of appeals' articulated standard effectively lowers a habeas petitioner's burden to show by a reasonable probability that the error in fact affected the outcome, by only requiring the petitioner to show that there was a reasonable probability that the arguments might have affected the outcome. The standard of review adopted by the court is in direct conflict with the standard of review announced in Donnelly and Brooks.

Finally, the court of appeals failed to consider the arguments in the context of entire proceeding when determining whether the proceeding was fundamentally unfair. Given the fact that the jury was instructed that the prosecutor's arguments were not evidence (E.g. A- 162), given the brevity of the remarks, given the effective response of defense counsel, given the strength of the evidence of guilt, given the strength of the evidence in support of the aggravating circumstance, and given the relative weakness of the evidence in mitigation[6], it cannot be said that the

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[5] The danger of this type of speculation was recently discussed by the Court in Wood v. Bartholomew, No. 94-1419, slip op. at 4 (U.S. October 10, 1995).

> "Whenever a federal court grants habeas relief to a state prisoner the issuance of the writ exacts great costs to the State's legitimate interest in finality. An where, as here retrial would occur 13 years later, those costs and burdens are compounded many times. Those costs may be justified where serious doubts about the reliability of a trial infested with constitutional error exist. But where, as in this case, a federal appellate court . . . grants habeas relief on the basis of little more than speculation with slight support, the proper delicate balance between the federal courts and the States is upset to a degree that requires correction."

[6] The state relied solely upon the evidence presented during the guilt phase of the trial in the penalty phase. The aggravating circumstances found were that the murder was committed in a place of lawful confinement and that the murder involved torture or depravity of mind. Two statutory mitigating circumstances

prosecutor's arguments were so egregious as to infect the trial with unfairness so as to make the resulting sentence a denial of due process. The result reached by the court of appeals in this case "leaves virtually meaningless the distinction between ordinary trial error of a prosecutor and the sort of egregious misconduct held . . . to amount to a denial of constitutional due process." Donnelly v. DeChristoforo, 416 U.S. at 647-48.

## Conclusion

For the foregoing reasons, petitioner prays the Court issue a writ of certiorari and reverse the judgment of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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were submitted: that respondents did not have a history of criminal activity and respondent's age at the time of the offense. Respondent presented one witness at the penalty phase. Respondent's brother testified about the effect their mother's death had on respondent, the lack of adult male supervision respondent had during his childhood, and the fact that respondent was his last living immediate relative.